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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

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No. 77-1177

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AUBREY SCOTT,  
*Petitioner,*

v.

PEOPLE OF THE STATE OF  
ILLINOIS,  
*Respondent.*

---

ON WRIT OF CERTIORARI  
TO THE SUPREME COURT  
OF THE STATE OF ILLINOIS

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BRIEF OF THE NATIONAL LEGAL AID  
AND DEFENDER ASSOCIATION  
AS AMICUS CURIAE

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INTEREST OF NLADA AS AMICUS CURIAE

(1) The National Legal Aid and Defender Association (NLADA) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to the poor. Its members include the great majority of

defender offices, coordinated assigned counsel systems, and legal aid societies in the United States. The NLADA also includes four thousand individual members, most of whom are private practitioners.

(2) The NLADA joins the petitioner in seeking to extend this Court's decision in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), to require that publicly compensated counsel be provided or properly waived before any person can be convicted of an offense for which incarceration is an available penalty. NLADA believes that the court's decision in *Argersinger* has led to significant problems which must now be considered and which lead to the conclusion that the right to counsel should be extended.

(3) The NLADA further believes that there has been sufficient experience in the area of providing defense services to assert that counsel can be provided in these additional cases without substantial increases in expenditures by local jurisdictions.

(4) The National Legal Aid and Defender Association has received the consent of both parties for the filing of this brief.

## ARGUMENT

### I. The Right To Counsel Can Be Extended To All Persons Charged With Offenses Punishable By Incarceration Without Undue Financial Hardship To Local Communities.

While NLADA strongly submits that this case should not be decided on the basis of the cost of extending counsel to all persons facing the possibility of incarceration, we are mindful of the concurring opinion of Justices Powell and Rehnquist in *Argersinger v. Hamlin*, 407 U.S. 25, 41-66 (1972), in which the issue of the cost of providing counsel was discussed at some length. NLADA believes that given the present "state of the art" and the knowledge regarding the appointment of counsel in misdemeanor cases, there are a number of vehicles which can be used to very substantially decrease the cost to local units of government of expanding the right to counsel to all persons faced with the possibility of incarceration.

#### A. Many jurisdictions have already expanded the right to counsel.

While under *Argersinger* counsel is constitutionally required only where the court determines that the defendant will probably be sentenced to jail if convicted, the fact is that many jurisdictions have already expanded the right to counsel beyond that required by *Argersinger*. In the most extensive study of the question undertaken since the Court's decision, NLADA ascertained that in more than half the reporting jurisdictions counsel is provided either all misdemeanor defendants or all those defendants charged with misdemeanors which are punishable by a jail sentence, *The*

*Other Face of Justice*, National Legal Aid and Defender Association (1973). Considering the fact that this study was undertaken only a year after the *Argersinger* decision, one can assume that many more jurisdictions have expanded the right to counsel beyond that which this Court mandated. Indeed, in states like Wisconsin, both the State Supreme Court<sup>/1</sup> and the legislature<sup>/2</sup> extended the right to counsel to all persons charged with crimes punishable by incarceration.

NLADA thus respectfully suggests at the outset that the cost question is not as great as it might appear. Indeed, it is respectfully submitted that many jurisdictions in this country have already expanded the right to counsel in misdemeanor cases beyond that which is required by *Argersinger*. It is submitted, therefore, that the fiscal ramifications to the country as a whole will not be nearly as great as would be anticipated if all jurisdictions had not expanded the right to counsel beyond *Argersinger*.

*B. Many offenses can, and should, be de-criminalized.*

The most obvious way to avoid the cost of providing counsel to persons charged with crimes punishable by incarceration is to change the applicable statutes so that such acts are not punishable by incarceration. In this way the legislature or the county board of supervisors can determine whether such offenses should remain

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<sup>/1</sup> *State ex rel. Winnie v. Harris*, 75 Wis. 2d 547, 249 N.W. 2d 791 (1977).

<sup>/2</sup> Sec. 977.08(2)(c), Wis. Stats. (1977).

criminal, or should be reduced to some type of civil forfeiture. In Wisconsin, for example, where the right to counsel has been extended to all persons charged with offenses punishable by incarceration, the legislature reclassified all crimes and civil forfeitures, and decriminalized a number of offenses previously classified as misdemeanors. While there has been great public controversy about decriminalizing some offenses, such as possession of marijuana, and those offenses which involve sexual conduct, the Wisconsin experience does not involve these types of offenses at all. The Wisconsin state legislature decriminalized such acts as possession of a fluoroscopic shoe-fitting machine (sec. 941.34, Wis. Stats.), refusal to relinquish a party line (sec. 941.35, Wis. Stats.), posting a trespassing sign on someone else's property (sec. 943.13(3), Wis. Stats.), and throwing debris on a lakeshore (sec. 947.047, Wis. Stats.). Each of these former misdemeanors was made a civil forfeiture in Ch. 173, *Laws of 1977, State of Wisconsin*. It is respectfully submitted that many jurisdictions could go through its statute books, and make enlightened political decisions as to which offenses are sufficiently important as to warrant confinement in jail, and which can be appropriately dealt with by a civil forfeiture.

If the Town of Wood, South Dakota — referred to in the concurring opinion in *Argersinger* — has insufficient resources to provide counsel to criminal defendants, perhaps it would have been more appropriate to require the defendant to pay a modest fine than to place him in a jail where the city would be required to house him, guard him, and feed him. Contrary to the suggestion in the concurring opinion, the Town of Wood does have options beyond simply prosecuting or not prosecuting. The town board, or the appropriate legislative body, could recognize the ramifications of making an offense a

criminal offense, and then decide to what extent the town's interest requires incarceration. If the town's interests are so important as to require such a penalty, then the right to counsel must attach. If the town decides that its interests are served by the imposition of a civil forfeiture, then that appropriate type of penalty can be imposed without counsel.

Adopting the petitioner's position in this case would require the states and local jurisdictions to rethink the propriety of some of the penalties set by statute. In Wisconsin, for example, the legislature determined that there was no particular reason for providing a sixty-day jail sentence for someone who possessed a fluoroscopic shoe-fitting machine. Similarly, the legislature revised a large number of traffic offenses to reduce them from misdemeanors to civil forfeitures. It is submitted that such a review of the criminal statutes would not only be appropriate to determine whether counsel should be provided, but is also generally appropriate simply to remove anarchistic laws from statute books, and to more appropriately set penalties. Reversal in this case might also suggest to the states that review of the enabling statutes giving local communities the power to establish crimes is also appropriate in view of the additional due process requirements in misdemeanor cases.

NLADA thus respectfully submits that the cost of complying with the decision in Scott's favor in this case will be very substantially reduced by the governmental agencies themselves reviewing and revising the statutes to decriminalize a number of petty offenses which need not and should not be considered crimes. If such offenses are important enough to carry a jail term and to be placed on the defendant's record as a crime, they are important enough to require the provision for or waiver

of counsel. If the legislative body feels that the offenses are minor and do not require incarceration, then no counsel will be required.

*C. Sufficient experience with public defender systems has been had so as to demonstrate that a significant cost saving can be had through a modification of the system for providing defense services.*

*1. There are superior and less expensive systems of providing defense services.*

There is no question but that if the local units of government respond to a reversal in this case by simply assigning additional private counsel to each case, the cost to some jurisdictions will be rather substantial. NLADA, however, respectfully submits that there are various options available to local communities which significantly mitigate the increase in cost, and may, in many instances, actually reduce the costs from that which is paid for compliance with *Argersinger*. NLADA strongly submits that adoption of public defender systems is a logical and appropriate response to this Court's decision to expand the right to counsel to all persons charged with misdemeanors. The jurisdiction which decides to continue the appointment of private counsel on an *ad hoc* basis would do so through choice, and not through the lack of available alternatives.

The NLADA emphatically rejects the proposition that public defender services are in any way inferior to that of assigned private counsel. Indeed, all evidence points to the contrary. The 1978 proposed draft of the American Bar Association's *Standards Relating to Providing*

*Defense Services* modifies the previous provisions to urge availability of public defenders in every jurisdiction. Sec. 5.1-2 of the proposed draft advocates the operation of a mixed public defender/assigned counsel system in every jurisdiction. The NLADA strongly supports the recommendation of the ABA *Standards*. The commentary to the proposed *Standards* points out the benefit of a public defender system:

When adequately funded and staffed, defender organizations employing fulltime personnel are capable of providing excellent defense services. By devoting all of their efforts to legal representation, defender programs ordinarily are able to develop unusual expertise in handling various kinds of criminal cases. Moreover, defender offices frequently are in the best position to supply counsel soon after an accused is arrested. By virtue of their experience, fulltime defenders also are able to work for changes in laws and procedures aimed at benefiting defendants and the criminal justice system.

The ABA *Standards* go on to urge the continuation of the substantial involvement of the private bar. Again, NLADA agrees. It must be noted, however, that the ABA Standing Committee, which was made up primarily of non-public defenders, made this important recommendation. In the NLADA's own study, *The Other Face of Justice*, eighty-five percent of the responding judges indicated that public defenders were equal or superior to retained counsel, p. 51, Table 83. The judges indicated that few assigned private counsel were superior to retained counsel, but that approximately one quarter of the public defenders were superior to those attorneys

who had been paid directly by the defendant. If there ever has been a time in this country when public defenders were second-class lawyers providing defense services only because of the inability to find other work, that time is long behind us. Presently the public defender systems available in many parts of this country are at least equal to, if not vastly superior to, representation which is available in criminal cases from the average private attorney.

2. The fiscal implications of this Court's decision can be very substantially mitigated.

The State of Wisconsin is undergoing a substantial change in providing defense services.<sup>/3</sup> In 1977 the legislature adopted a unique state-wide public defender system which not only creates a mandatory mixed system of public defenders and private counsel, but also removes from the judiciary the power to appoint counsel, placing that power under the State Public Defender, who is required to follow strict due process guidelines to determine which attorneys are appointed, see Ch. 977, Wis. Stats. (1977). In creating the state-wide trial public defender system, the State of Wisconsin has analyzed the ramifications of expanding the right to counsel from that mandated by *Argersinger* to that mandated by the Wisconsin Supreme Court in *State ex rel. Winnie v. Harris, supra*, and that which would be required by reversal in this case.<sup>/4</sup>

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<sup>/3</sup> The writer of this brief served as State Public Defender of the State of Wisconsin from November 1972, until September 1, 1978.

<sup>/4</sup> The data in this brief is taken from the budget documents submitted to the Governor of the State of Wisconsin by the Office of the State Public Defender in September, 1978.

The Wisconsin study reveals several things. First, that under any set of circumstances, a large number of persons charged with misdemeanor offenses, even carrying jail sentences, are going to waive counsel. In Wisconsin, for example, there is no county in which more than fifty per cent of the misdemeanants requested that counsel be appointed, notwithstanding the fact that most counties are complying with the Wisconsin Supreme Court's decision mandating counsel in every misdemeanor case. While under *Argersinger* counsel was appointed in between fifteen and twenty-five per cent of the misdemeanor cases, after the *Winnie* decision, counsel has been assigned in between twenty-five and forty per cent of the cases. Even in those counties which experienced a dramatic rise in the appointment of counsel in misdemeanor cases, it occurred not so much from expanding the right beyond *Argersinger*, but in appointing counsel in any misdemeanor cases. A year-long investigation by the State Public Defender revealed that in some counties in Wisconsin counsel had never been appointed in misdemeanor cases. After public scrutiny was given to the lack of counsel in misdemeanor cases, the number of attorneys appointed rose dramatically in some counties, not because of the *Winnie* decision, but rather because the local county courts were for the first time following *Argersinger*. Considering the conclusion reached in Krantz, *Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin* (1976), one might assume that if this Court grants the petitioner relief that there will be many false readings on the impact of the decision because of the failure of many jurisdictions to comply with *Argersinger*, even now, five years after it was decided.

The Wisconsin study also revealed some important fiscal data which will be of relevance if the court is

concerned with the cost of implementing the *Scott* decision. The Wisconsin figures reveal that the average public defender cost of handling a misdemeanor case, that is, a criminal case in which the statute provides for jail punishment, is approximately \$90. This figure is arrived at by an average of public defender cases in those urban communities in Wisconsin, such as Milwaukee and Madison, which have public defenders, and averaging them with those public defender systems in Wisconsin which are in rural areas, such as Oneida, Forest, and Portage Counties. In the urban counties, the cost-per-case is significantly less, due to the economy of scale, while the number is somewhat greater in the rural counties. The cost for appointing private attorneys who are compensated in Wisconsin at the rate of \$30 per hour is between \$150 and \$200 per case. This rate does not vary significantly from the urban to rural areas, although courts vary in their practices of reducing attorney billings.

Assuming that an affirmative decision in *Scott* will increase the number of attorneys appointed by as much as fifty per cent, the cost in each jurisdiction can be computed out rather accurately. Indeed, should jurisdictions now using assigned counsel systems go to a mixed system of fifty per cent public defender and fifty per cent private bar, the cost of expanding the right to counsel from that recognized in *Argersinger* to that which would be required by this case, would be less than a ten per cent increase. If jurisdictions were to go to a system of twenty-five per cent private bar and seventy-five per cent public defenders, the cost of providing counsel would actually decrease from *Argersinger* to the expanded role. This can be demonstrated in a jurisdiction which has one thousand misdemeanor cases per year. Now approximately two-hundred-fifty persons will receive assigned counsel services at a cost of

approximately \$50,000. If the right to counsel is expanded, and if the Wisconsin experience is typical, a system in which two hundred misdemeanants receive assigned counsel, and two hundred misdemeanants receive public defender services, the cost to the jurisdiction will be approximately \$58,000. If the mix is twenty-five per cent private bar and seventy-five per cent public defender, the costs will be \$47,000, or \$3,000 less than present, although one-hundred-fifty people will be receiving counsel who did not receive it under the earlier decision.

The foregoing analysis assumes that there is no partial payment of attorneys' fees by the defendant, and that recoupment is not possible. Obviously, these are possible vehicles for providing counsel, although NLADA does not advocate either.

While the foregoing analysis is based upon one state's experience, albeit a fairly detailed experience with documented evidence, specific numbers will unquestionably vary from jurisdiction to jurisdiction. The primary position advanced by NLADA, however, is that after a careful study of the costs of providing counsel, and examination of the existing caseload and the anticipated caseload, the costs of providing counsel to every person charged with a crime carrying a criminal penalty can be very substantially mitigated, and in some instances the increase can be eliminated altogether. If jurisdictions choose to continue with the *ad hoc* appointment of individual private attorneys at an hourly rate, the cost will be greater, but that is a choice each jurisdiction will have to make for itself. NLADA believes that effective and competent representation can be provided through a mixed system of public defenders and private bar, and can very substantially reduce costs. If

the jurisdictions choose to adopt that type of system, the cost of implementing this decision can be drastically reduced.

## **II. There Are Substantial Reasons For Reconsidering The Decision In Argersinger.**

- A. The lack of any standards for determining when counsel is required leads to the arbitrary denial of counsel.**

In *Argersinger*, the Court gave little guidance to trial courts to determine when counsel should be assigned, other than requiring that counsel be assigned if the defendant is ultimately sentenced to jail. The problems with this decision are manifest. Primarily among them is the fact that there are no standards or criteria for a court to determine which cases get counsel and which do not. Inasmuch as for each such offense the legislature has already determined that in at least some instances incarceration is appropriate, the court must then decide in which of such cases incarceration will actually be imposed. In some jurisdictions the judge will entirely abdicate his or her responsibility to impose sentence by relying entirely upon the recommendation of the prosecutor, who will inform the court in advance of whether a jail sentence is sought, see, *The Other Face of Justice*, p. 38, Table 53. This shift of the sentencing responsibility from the court to the prosecutor is obviously not advisable.

In many jurisdictions the right to counsel will depend upon the personal philosophy or point of view of the judge in the case. In such typical misdemeanor cases as possession of marijuana; fornication; prostitution; and issuing worthless checks, the sentencing policy may differ dramatically from one judge to another, so that

the right to counsel will not depend so much upon the offense with which a defendant is charged, as upon the judge or county in which the offense took place. In some counties possession of marijuana may be charged as a civil forfeiture under a county ordinance, while in other counties, possession of marijuana will be charged as a misdemeanor and jail routinely imposed. In such circumstances the courts will have basically usurped the prerogatives of the legislature by determining in advance what type of sentence will be imposed in every case, while at the same time basing the defendant's right to counsel on the judge or the jurisdiction, and not on the offense, the possible penalty, or the defendant's background.

In a more typical situation, however, the judge will make some type of pretrial inquiry to determine that if the defendant is convicted, he or she will probably be sent to jail. While such a policy has been questioned by the petitioner, it has also been identified as a problem in the concurring opinions of the Chief Justice and Justice Powell in *Argersinger*. More recently, the Chief Justice, in the Court's opinion in *Holloway v. Arkansas*, \_\_\_\_ U.S. \_\_\_, 98 S. Ct. 1173, 1180, fn. 11 (1978), noted that it would be "unfair" to disclose to the trial judge information before trial which may ultimately reflect on the court's actions at trial, or in sentencing. It seems obvious to the NLADA that requiring a court to make a pretrial examination of the defendant's background is inherently prejudicial and contrary to fundamental notions of fairness and due process of law.

The Court has failed to require that the jurisdictions adopt any kind of guidelines, criteria, or standards for determining when jail will be imposed, and thus when counsel will be required. Unlike the Court's decision in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), wherein the Court did lay down standards and criteria for determining

when a probation or parole revoker had the right to counsel, *Argersinger* is silent on that point. It is respectfully submitted that the lack of such standards is a manifest shortcoming of the *Argersinger* decision.

B. *Argersinger leaves unanswered many critical problems regarding the provision of counsel in criminal cases.*

It is respectfully submitted that the rule of *Argersinger* creates many problems in providing counsel. While the suggestion has been made in the concurring opinions in *Argersinger* that it is possible to grant a mistrial during a case in which counsel has not been appointed for the purpose of assigning counsel, and, thereby exposing the defendant to incarceration, NLADA has grave reservations regarding the constitutionality of such procedure, as is also suggested in the concurring opinions. NLADA does not see that as the most serious problem with the implementation of *Argersinger*. In addition to the lack of any articulated standards, NLADA believes that the Court must address the problem of what procedures follow the imposition of a fine or probation when the defendant faces jail because of probation revocation or the failure to pay a fine.

If the defendant is charged with a crime which carries a penalty of incarceration, but such incarceration is withheld in favor of a fine or probation, the defendant apparently would have no right to counsel under *Argersinger*. Assuming that probation is imposed, or that the defendant is sentenced to a fine, what happens when either probation is revoked, or the fine not paid? Can a defendant be sent to jail for failure to pay a fine when the

original conviction was obtained without counsel? One can readily envision a situation in which counsel would be required in a probation revocation under *Scarpelli* (which apparently applies to both felony and misdemeanor cases), wherein the defendant was not entitled to counsel at the time of the original conviction. This may be the case even though the condition of probation which the defendant is alleged to have violated was a condition imposed by the court at the time of the original sentence, at which time he or she had no right to counsel.

NLADA does not believe that a defendant who has been tried without counsel or without waiving counsel can be sent to jail under any circumstances. Even if counsel is provided at a hearing to determine whether the failure to pay the fine was willful, or to determine whether the defendant violated the conditions of the probation, that still does not reach the issue of whether the defendant was afforded due process of law at the time of the original trial, and whether the conviction was validly entered.

NLADA also submits that it would be a violation of the double jeopardy provisions of the fifth and fourteenth amendments to the United States Constitution to allow a defendant to be re-prosecuted for a crime, with counsel, after his conviction for the same crime without counsel, see *Krantz, supra*, p. 77, citing *Downum v. United States*, 372 U.S. 734 (1965).

## CONCLUSION

The National Legal Aid and Defender Association respectfully submits that adoption of the position advocated by the petitioner in this case will not unduly burden local jurisdictions which will be faced with some additional expense in providing counsel. It further submits that there is sufficient experience with defender systems in this country to assert that there are a number of methods in which the cost of counsel can be very substantially reduced. NLADA feels there have been substantial problems with the implementation of *Argersinger*, and there remain problems with its meaning and scope. For all of these reasons, as well as for the reasons asserted by the petitioner, which are adopted by amicus, NLADA respectfully submits that the mandate of the Illinois Supreme Court should be reversed and the cause remanded with directions to grant the petitioner a new trial, at which time he is represented by counsel.

Respectfully submitted,

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